United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: December 30, 2003

TO: Gerald Kobell, Regional Director
Region 6

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Neville Chemical Company
Case 6-CA-33423

530-6067-6033
530-6067-6067-5267
530-6067-6067-6067
530-6067-7600
530-8095

This case was submitted for advice as to whether the Employer unlawfully refused to furnish fitness-for-duty information about employees returning from workers' compensation and illness/non-work related injury leave, when the Employer's only asserted defense is that the Health Insurance Portability and Accountability Act (HIPAA)[1] prohibits it from furnishing the information. We conclude that the Employer violated Section 8(a)(5) and (1) by refusing to furnish the information to the Union without condition. The Employer may not rely on privacy protections guaranteed to individuals under HIPAA because the Employer is not an entity subject to HIPAA's restrictions on disclosure. Even assuming coverage, HIPAA would not privilege the Employer's refusal to disclose the fitness-for-duty information because the Employer uses it to make employment, and not health care, decisions. The requested information is also not confidential under Board law because employees do not have an expectation of confidentiality in the information, as the Employer had consistently furnished it to the Union without requiring employee consent.

FACTS

The United Steelworkers of America, Local 5032 (Union) is the collective bargaining representative of a unit of employees at Neville Chemical Company (Employer), which manufactures hydrocarbon resins. The collective bargaining agreement grants sickness and accident benefits to employees who are unable to work due to non-work related illnesses or accidents. Employees unable to work due to work-related injury or illness receive workers' compensation benefits,

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[1] Health Insurance Portability and Accountability Act, Pub. L. No. 104-191, 110 Stat. 1936 (1996) (codified in scattered sections of 26 U.S.C., 29 U.S.C., and 42 U.S.C.). HIPAA is a federal law creating a system of national protections for the privacy of individually identifiable health information.

which are more generous than the contractual sickness/ accident leave benefits.

The Employer often places employees returning from leave on light duty. The collective bargaining agreement grants equal access to light duty for employees returning to work from either workers' compensation or sickness/accident leave. In making assignments to light duty, however, the Employer may consider an employee's physical restrictions on work, which are noted by the employee's physician on an Employer form called a Physical Capacity Evaluation Sheet (PCES). After completion of the PCES by the physician, the employee or physician provides it to the Employer. The Employer then uses the PCES as the basis for determining whether to recall to light duty, restricted duty, or full duty, as well as how work is assigned, and who will be recalled. Prior to the events herein, the Employer had always given the Union the PCES forms without requiring employee consent so the Union could monitor the appropriateness of recalls and job assignments.

According to the Union, the provision requiring equal access to light duty for employees returning from leave was negotiated to ensure that employees out of work on either type of leave are treated fairly. The Union believes that the Employer might violate this contract provision by more quickly returning employees out on workers' compensation because those benefits are better and are provided at a higher cost to the Employer than benefits for employees out on sickness/accident leave. The Union also asserts that it seeks the PCES forms to ensure that employees with work restrictions do not adversely affect the bumping rights of non-injured unit employees on a shift.

On April 14, 2003,[2] the HIPAA regulations (Privacy Rule)[3] took effect. On April 17, Union President Marino asked Employer Assistant to the Human Resources Director Nolte about the work restrictions of employee [*FOIA Exemptions 6 and 7(c)*], who was returning after having been out on workers' compensation leave for over a year. Unlike in the past, Nolte refused to provide the information, asserting that "HIPAA has taken effect." On April 21, after Marino's independent investigation suggested that other, more senior, employees should have been recalled before [*FOIA Exemptions 6 and 7(c)*] because they had fewer work restrictions, he again requested [*FOIA Exemptions 6 and*

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[2] All dates are in year 2003.

[3] The United States Department of Health and Human Services Office of Civil Rights (DHHS) implements and enforces HIPAA through the Privacy Rule. See 45 CFR §§ 160 & 164 (2002).

7(c)] PCES;[4] the Employer again refused, citing HIPAA. Two days later, Marino again requested [*FOIA Exemptions 6 and 7(c)*] PCES form, explaining that a unit employee had informed him that a plant manager said that more senior employees would not be able to use their seniority to bump [*FOIA Exemptions 6 and 7(c)*] from the day shift because of his restrictions. On April 25, in response to another Union request, Nolte responded that the Employer's attorneys said that the Union had no right to the information. Nolte also demanded a letter from the Union explaining why the information was relevant, and requested permission from [*FOIA Exemptions 6 and 7(c)*] to allow the Union to see his PCES.[5] The Union refused to furnish a letter because it had never had to do so in the past.

On May 1, employee [*FOIA Exemptions 6 and 7(c)*] told Marino that the Employer had sent him home, claiming that his physical restrictions on returning to work were greater than it had previously known. [*FOIA Exemptions 6 and 7(c)*] told the Union that there had been no change in his restrictions. Marino asked Nolte for [*FOIA Exemptions 6 and 7(c)*] PCES. Nolte had [*FOIA Exemptions 6 and 7(c)*] sign a consent form before releasing his PCES to the Union.

ACTION

We conclude that the Region should issue complaint, absent settlement, alleging that the Employer unlawfully refused to furnish employee PCES forms without condition. First, HIPAA privileges neither the Employer's refusal to furnish this information nor its condition to furnish the information on an employee's provision of consent. The Employer is not a HIPAA-covered entity, and the PCES forms are employer records unprotected by HIPAA. The PCES forms are also not confidential under Board law principles because employees do not have a reasonable expectation of confidentiality in their forms, as the Employer had consistently provided them to the Union in the past without requiring employee consent.

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[4] The Union also contends that the more senior employee was a Union officer, so it had concerns that the employer may have discriminated against him based on union considerations.

[5] It is unclear whether [*FOIA Exemptions 6 and 7(c)*] consented to disclosure of his PCES.

A union is generally entitled to information that is relevant to its collective-bargaining responsibilities.[6] Under Detroit Edison v. NLRB,[7] a union's interest in arguably relevant information does not always predominate over all other interests, such as confidentiality in employee medical records. When an employer asserts a legitimate and substantial interest in maintaining confidentiality, it may condition disclosure of the information, such as disclosing the information on the receipt of employee consent.[8] In determining whether an employer has satisfied its burden of establishing this interest, the Board considers factors such as whether: the nature of the information possesses a "legitimate aura of confidentiality;"[9] the employer fabricated confidentiality to frustrate the union's collective bargaining responsibilities;[10] the employer promised employees confidentiality;[11] the employer has a clear past practice or policy of confidentiality;[12] employees reasonably anticipate that information would not be made readily available to the

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[6] See NLRB v. Acme Industrial Co., 385 U.S. 432 (1967).

[7] 440 U.S. 301, 318 (1979).

[8] Id. at 318-20; see also Johns-Manville Sales Corp., 252 NLRB 368, 368 (1980) (employer lawfully conditioned release of medical information on employee consent).

[9] See Exxon Co. USA, 321 NLRB 896, 898-99 (1996), enfd. 116 F.3d 1476 (5th Cir. 1997) (identities of persons who disclosed prior drug or alcohol-related arrests, convictions, and rehabilitation); Johns-Manville Sales Corp., 252 NLRB at 368 (employees with a certain medical disorder).

[10] Detroit Edison Co. v. NLRB, 440 U.S. at 318 (psychological aptitude tests and test scores were kept in the offices of employer's industrial psychologists who, based on industry standards, deemed themselves bound to keep the information confidential; thus, employer did not fabricate confidentiality).

[11] See Wayne Memorial Hospital Assn., 322 NLRB 100, 103 n. 14 (1996); Remington Arms Co., 298 NLRB 266, 273 (1990); Washington Gas Light Co., 273 NLRB 116, 117 (1984).

[12] See Washington Gas Light Co., 273 NLRB at 117.

union without their consent;[13] and there is another law protecting the confidentiality of the information.[14]

Here, we first conclude that the PCES forms are necessary and relevant to the Union's collective bargaining responsibilities. The Union seeks to verify that the Employer is complying with the contractual guarantee that employees returning to work from workers' compensation leave and sickness/accident leave receive an equal opportunity to obtain light duty work, subject to their restrictions. The Union is concerned that the Employer seeks to return employees who, like [*FOIA Exemptions 6 and 7(c)*], are out on workers' compensation leave before employees out on sickness/accident leave to avoid paying more expensive workers' compensation benefits. The Union also requested the PCES forms to ensure that the Employer does not adversely affect other, non-injured unit employees' bumping rights.

In both refusing and conditioning disclosure of the PCES forms, the Employer relied only on HIPAA, but HIPAA's obligations apply only to certain entities. Under the Privacy Rule, "covered entities"[15] are prohibited from misusing and sharing protected health information (PHI).[16] A "covered entity" means: a health plan; a health care clearinghouse; or a health care provider who transmits any health information in electronic form.[17] The Employer is

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[13] See Wayne Memorial Hospital Assn., 322 NLRB at 104.

[14] See Postal Service, 305 NLRB 997, 998 (1991) ("When a defense of confidentiality is raised, the Board must balance the interests of the party seeking the information against those of the party asserting the defense, and may look to other statutes ... as sources of policy to be considered in striking the balance"), citing Detroit Edison, supra, at 318 n.16; Goodyear Atomic Corp., 266 NLRB 890, 891-92 (1983), enfd. 738 F.2d 155 (6th Cir. 1984) (disclosure of aggregate and statistical medical information not prohibited by Privacy Act); LaGuardia Hospital, 260 NLRB 1455, 1463 (1982) (patient's right of privacy not absolute under state law, which authorizes disclosure when otherwise required by law).

[15] Not all employers are "covered entities." HIPAA defines an employer as a "person for whom an individual performs or performed any service ... as the employee of such person." See id. at § 160.103, citing 26 U.S.C. § 6011.

[16] See id.

[17] See id. at § 160.102(a)(1)-(3).

not one of these entities. In a telephone conversation with the DHHS Office of Civil Rights, which is responsible for enforcing HIPAA, that office confirmed the Region's and our conclusion that the Employer here is not a covered entity under this HIPAA definition.

The Employer concedes that it may not be a covered entity under HIPAA's definition, but notes that it is a plan sponsor of health care plans. It argues that that status imposes a level of fiduciary responsibility akin to vicarious liability with respect to a covered entity under HIPAA; that is, it may be required to ensure that the health plans comply with HIPAA. However, the Privacy Rule does not include "plan sponsor"[18] in the list of "covered entities" that must abide by the rule.[19] The DHHS Office of Civil Rights confirmed our conclusion that the Employer is not a covered entity simply because it sponsors health plans and offers its employees health benefits.

Even if the Employer were a "covered entity," we also agree with the Region that HIPAA would not protect PCES forms from disclosure as PHI. The Privacy Rule defines PHI as:

> "individually identifiable health information," which "includ[es] demographic information collected from an individual, and is created or received by a health care provider, health plan, employer, or health care clearinghouse; and relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual ... ."[20]

However, the Rule expressly excludes from the definition of PHI "employee records held by a covered entity in its role as employer."[21] Thus, even assuming the Employer is a covered entity, we agree with the Region that the PCES forms

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[18] See id. at § 164.501. Under HIPAA, a "plan sponsor" means an employer in the case of an employee benefit plan established or maintained by the employer.

[19] See 67 Fed. Reg. 53182, 53192 (2002).

[20] See 45 CFR § 160.103.

[21] See id. at § 164.504(f). The Privacy Rules' Interpretive Guidelines state that medical information contained in a report of a fitness-for-duty examination is part of an employee's employment record and is not PHI. See 67 Fed. Reg. 53182, 53192 (2002).

are not PHI under HIPAA. The DHHS Office of Civil Rights confirmed our conclusion that the PCES forms are not PHI, because the Employer holds them in its capacity as an employer, and not in a health care related capacity.

In addition to rejecting the Employer's defense that HIPAA privileges its refusal to furnish the PCES forms or to condition their disclosure on employee consent, we further conclude that the forms are not confidential under Board law. Although the information in the PCES forms likely possesses a "legitimate aura of confidentiality" as medical related information,[22] the Employer had previously furnished this information to the Union without requiring employee consent, and never promised employees that their PCES forms would remain confidential. Significantly, in rejecting the Union's requests, the Employer only relied on HIPAA's disclosure prohibitions,[23] and no other claims of confidentiality such as a policy of maintaining the confidentiality of PCES forms.[24] Consequently, employees do not have a reasonable expectation that the Employer would keep this information confidential or require employee consent for release to the Union.

Thus, in accordance with the above, the Region should issue complaint, absent settlement, alleging that the Employer refused to disclose employee PCES forms, and unlawfully conditioned their disclosure on employee consent in violation of Section 8(a)(5) and (1).

B.J.K.

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[22] See Johns-Manville Sales Corp., supra.

[23] See Howard University, 290 NLRB 1006, 1007 (1988) (employer failed to carry its burden of showing a confidentiality interest in patient medical records requested by the union; Board rejected employer's reliance on the statutory physician-patient privilege in the D.C. Code and Municipal Regulations, which applied only to in-court disclosures, and employer policies, which did not prohibit disclosure of medical records in all circumstances).

[24] See Wayne Memorial Hospital Assn., 322 NLRB at 104 (employer's past release of information from employee personnel files to various individuals and entities is "hardly consistent" with its stated concern for the privacy rights of employees).